123

(2)

FILED
MAR 10 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-1037

In The
Supreme Court of the United States

CITY OF LOS ANGELES, LOS ANGELES POLICE DEPARTMENT, BRAD ROBERTS, JENNIFER HICKMAN, STEVE PARK, AND FOSTER RAINS,
Petitioners,

v.

RAYMOND TORRES AND MARIA ELVA AMADOR TORRES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

NELSON E. BRESTOFF
NELSON E. BRESTOFF,
A PROFESSIONAL LAW CORPORATION
7701 WOODLEY AVENUE
SUITE 120
VAN NUYS, CALIFORNIA 91406

Counsel for Respondents

JULIA A. FOLLANSBEE
FOLLANSBEE & ASSOCIATES
Counsel of Record
61510 COUGAR TRAIL
BEND, OREGON 97701
(541) 318-5991

Counsel for Respondents

March 10, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Court of Appeals for the Ninth Circuit reversed the district court's grant of a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a) on the issue of qualified immunity. Based upon the disputed issues of material fact at the close of evidence, the court of appeals determined that if all reasonable inferences were drawn in favor of Respondent Raymond Torres as Rule 50(a) requires, a reasonable jury could have reached a verdict in his favor on his Section 1983 claim that he was arrested without a warrant and in the absence of probable cause.

Petitioners argue that *Hunter v. Bryant*, 502 U.S. 224 (1991)(per curiam), which holds that qualified immunity is a matter of law for the court *under the circumstances of that case*, should be extended to "trump" Rule 50(a)'s mandate that the trial court weigh the sufficiency of the evidence using the "reasonable jury" standard, and that this case is an appropriate vehicle for this Court to say so. The issue, simply stated, is whether the trial court should decide the material disputed facts pursuant to a Rule 50(a) motion when there is a defense of qualified immunity.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 5

1. Rule 50(a) Precludes a Court from Deciding Qualified Immunity As a Matter of Law at the Close of Evidence without Regard for Disputed Facts 5

2. The Petitioners Waived Their Right to Assert Qualified Immunity As an Immunity from Suit 9

3. *Hunter v. Bryant*'s Undisputed Facts Establishing Probable Cause At Summary Judgment Cannot Trump the Reasonable Jury Standard in Rule 50(a), Because Disputes Involving the Historical Facts Leading Up to An Arrest Are for the Jury 11

4. There Is No Conflict Among the Circuits . 15

5. Petitioners Have Distorted the Facts 19

6. There Is No Reason Why this Case Should Not Be Remanded for Trial 28

CONCLUSION 29

TABLE OF AUTHORITIES

Anderson v. Creighton,
483 U.S. 635 (1987) 13

Anderson v. Liberty Lobby,
477 U.S. 242 (1986) 6, 11, 27, 28

Beck v. Ohio,
379 U.S. 89 (1964) 4

Butz v. Economou,
438 U.S. 478 (1978) 28

Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.,
120 U.S. 141 (1887) 13

Hunter v. Bryant,
502 U.S. 224 (1991)(per curiam) ... 2, 10, 11, 12

Johnson v. Breeden,
280 F.3d 1308 (11th Cir. 2002) 18, 19

Maryland v. Pringle,
540 U.S. 366 (2003) 12, 13, 26

Mitchell v. Forsyth,
472 U.S. 511 (1985) 10

Monell v. New York City Department of Social Services,
436 U.S. 658 (1978) 10

Payne v. Tennessee,
501 U.S. 808 (1991) 14

Pearson v. Callahan,
___ U.S. ___, 129 S.Ct. 808 (2009) .. 7, 10, 14, 26

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S.133 (2000) 7

Riccardo v. Rausch,
375 F.3d 521 (7th Cir. 2004) 17

Rodriguez-Marin v. Rivera-Gonzales,
438 F.3d 72 (1st Cir. 2006) 8, 15, 16

Saucier v. Katz,
533 U.S. 194 (2001) 2, 4, 14

Sloman v. Tadlock,
21 F.3d 1462 (9th Cir. 1994) 11

Stewart v. Sonneborn,
98 U.S. 187 (1878) 13, 27

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 5, 6, 7, 9

Weisgram v. Marley Co.,
528 U.S. 440 (2000) 7, 8

Willingham v. Crooke,
412 F.3d 553 (4th Cir. 2005) 16, 17, 28

STATUTES AND RULES

42 U.S.C. § 1983 1

Fed.R.Civ.P. 12(b)(6) 10

Fed.R.Civ.P. 50(a) ..... *passim*

OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. 1a-31a, is reported at 548 F.3d 1147 (9th Cir. 2008). The district court's judgment, Pet. App. 32a-41a, is unreported.

STATEMENT OF THE CASE

This case arises from a suit for damages under 42 U.S.C. § 1983, alleging that Petitioners' warrantless arrest of Respondent Raymond Torres violated his right under the Fourth and Fourteenth Amendments not to be arrested without probable cause.

The key issue on certiorari involves the application of qualified immunity in the context of a Rule 50(a) motion for judgment as a matter of law. Rule 50(a) is a motion to the district court, requiring that court to "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence[.]" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-151 (2000). According to the court of appeals, Petitioners "are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to Torres, they violated no clearly established constitutional right." Pet. App. 21a. If the facts are in dispute, or if the facts favorable to Torres demonstrate that a reasonable jury could conclude that Petitioners violated Torres's clearly established constitutional right, the district court was required to deny the Rule 50(a) motion, not grant it.

A Rule 50(a) motion may be made "[i]f a party has been fully heard on an issue during a jury trial," Rule

50(a)(1), and "at any time before the case is submitted to the jury." Rule 50(a)(2). Thus, Rule 50(a) presumes a jury has heard all the evidence, but has not yet had the case submitted for their consideration. By the time a Rule 50(a) motion is made, litigation is long past its initial stages.

Here, as Rule 50(a) provides, at the conclusion of the evidentiary phase of the trial – but before closing argument, instructions to the jury, and a verdict – Petitioners orally moved to dismiss the case, arguing there was probable cause and as a "fallback," qualified immunity. The district court granted the motion, holding in part that all of the Petitioners were entitled to qualified immunity. On appeal, the court of appeals affirmed in part, reversed in part, and remanded.

The court of appeals engaged in the two-part analysis for qualified immunity mandated at the time in *Saucier v. Katz*, 533 U.S. 194 (2001): "The first question is whether the facts, when taken in the light most favorable to Plaintiffs, show that Defendants' conduct violated a constitutional right. [*Saucier*, 533 U.S.] at 201. The second question is whether the constitutional right at issue is 'clearly established.' *Id.* at 202." Pet. App. 21a.

Citing *Hunter v. Bryant*, the court of appeals acknowledged that qualified immunity is a question of law, not a question of fact, but observed that Petitioners would be entitled to qualified immunity as a matter of law in the context of a Rule 50 motion only

> if, taking the facts in the light most favorable to Torres, [Petitioners] violated no clearly established constitutional right. The court must

> deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated Torres' constitutional right, and the right at issue was clearly established.

Pet. App. 21a. Because of the Rule 50(a) context and its required viewing of the facts in Respondents' favor, the court of appeals reversed in part because material, disputed facts were in evidence from which a reasonable jury could have found that probable cause to arrest was lacking:

> Disputes of fact exist as to whether Diana positively identified Torres, whether school police officer Steinberg told Officer Lamar and/or Detective Hickman that Torres had "recently been jumped into the CPA gang," and whether it was reasonable for the detectives to believe that in the group photo Torres was making a gang sign despite the fact that only one of Torres' fingers is visible in the photo. These disputes of fact are material because they go to what the detectives knew at the time they arrested Torres and, accordingly, to whether they had probable cause, and reasonably believed they had probable cause, to do so. Taking these facts in the light most favorable to Torres, a reasonable officer would have known that he lacked probable cause for the arrest.

Pet. App. 23a-24a.

This conclusion, that a reasonable jury could have found that Petitioners arrested Torres without probable cause, led directly to the court of appeals' conclusion on the second *Saucier* inquiry; e.g., whether

the constitutional right was clearly established. Citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964), the court noted that "[c]ourts have long held that the Fourth Amendment requires probable cause before an officer may arrest an individual." Pet. App. 24a. Then, the court adverted to this Court's decision in *Saucier* for the touchstone that "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Pet. App. 24a.

The court of appeals concluded that a reasonable jury could find, in view of the disputed facts in evidence, that reasonable officers would not have concluded that they had probable cause to arrest as Petitioners Roberts and Park did. Rather,

> [i]n light of the arguably suggestive six-pack, [the eyewitness's] merely comparative identification six weeks after the shooting, the lack of direct evidence that Torres was a member of a gang (let alone the CPA gang), the lack of physical evidence tying Torres to the shooting, the fact that Torres did not attempt to flee when the detectives approached him, and the lack of evidence that the third male passenger acted in concert with Castaneda with conscious disregard for human life, a material issue of fact existed as to whether a reasonable officer would have relied on [the information in the detectives' possession] *without further verification*.

Pet. App. 24a-25a (internal quotation marks and citation omitted) (emphasis added).

REASONS FOR DENYING THE PETITION

1. Rule 50(a) Precludes a Court from Deciding Qualified Immunity As a Matter of Law at the Close of Evidence without Regard for Disputed Facts.

The purpose of Rule 50(a) does not comport with holding, as a matter of law, that questions surrounding qualified immunity are never for a jury regardless of what stage litigation is in. *See, e.g., Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399 (2006)(Rule 50 allows a party to challenge the sufficiency of the evidence before the case is submitted to the jury). Rule 50(a) states:

> Judgment as a Matter of Law. (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Whenever the issue is qualified immunity, the Petitioners ask this Court to ignore Rule 50(a)(1)'s mandate that a district court examine whether "a reasonable jury would . . . have a legally sufficient evidentiary basis to find for a party on that issue."

This Court has held that the role of the jury with respect to Rule 50(a) cannot be so denigrated, because

to do so would place the court in the role of factfinder when the parties dispute what the facts are. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are *jury* functions, not those of a judge, whether he is ruling on a motion for summary judgment *or for a directed verdict*." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255 (1986)(emphasis added). "The evidence of the non-movant is to be believed by the judge in deciding a Rule 50(a) motion, and all justifiable inferences are to be drawn in his favor." *Id.* (*citing Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970)).

This Court has explained what courts of appeal may and may not do pursuant to Rule 50(a): "'the court of appeals could set aside the verdict for error of law, such as the trial court's *ruling* respecting the sufficiency of the evidence, . . . but could not itself determine the issues of fact and direct a judgment for defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury[.]'" *Unitherm,* 546 U.S. at 402 n.4 (2006)(*quoting Baltimore & Carolina Line, Inc. v. Redman,* 295 U.S. 654, 658 (1935)). Likewise, to do as Petitioners suggest – have a *trial court* decide disputed issues of fact on a Rule 50(a) motion and direct a judgment as happened here – countermands not only *Unitherm* but also the Seventh Amendment right to a jury trial. "Indeed, Rule 50 was drafted with such concerns [as the constitutional right to a trial by jury] in mind." *Id.* (*citing* 9A C. Wright & A. Miller, Federal Practice and Procedure § 2522, pp. 244-246 (2d ed. 1995)).

Clearly, according to both Rule 50(a) and this Court's precedent, the role of the judge when presented with a Rule 50(a) motion is *only* to determine whether *a reasonable jury* could find for the non-movant. Where there is sufficient evidence, it is *not* the judge's role to decide, as a matter of law, the issue of qualified immunity and thus preclude the jury's resolution of any disputed facts surrounding it.

While *Saucier's* two-step protocol to decide whether there is qualified immunity is a judge-made rule subject to change by this Court, the Federal Rules of Civil Procedure are not. *See Pearson v. Callahan,* ___ U.S. ___, 129 S.Ct. 808, 817 (2009)(distinguishing judge-made rules from "'a general presumption that legislative changes [to statutes] should be left to Congress'")(*quoting State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997)). As Justice Stevens has observed, "we have an overriding duty to obey statutory commands that unambiguously express the intent of Congress even in areas such as *procedure* in which we may have special expertise." *Unitherm,* 546 U.S. at 407 (Stevens, J., dissenting) (emphasis added). And, regarding statutory commands, "Rule 50(a)(1) . . . states that in ruling on a motion for judgment as a matter of law, the court is to inquire whether there is any 'legally sufficient evidentiary basis for a reasonable jury to find [for the opponent of the motion.]'" *Weisgram v. Marley Co.,* 528 U.S. 440, 453-54 (2000)(*quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 242 (1993)).

Therefore, contrary to what the Petitioners assert, there is no room under Rule 50(a) – a clear expression of Congressional intent – for any "trumping" by the idea that only courts may determine qualified

immunity as a matter of law, without regard for disputes of fact that are in evidence. *See* Pet. 16 ("the reasonable jury standard [of Rule 50(a)] does not trump the straightforward 'clearly established' inquiry."). Instead, the law is that a "'motion for judgment cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case.'" *Weisgram,* 528 U.S. at 452 n.9 (*quoting Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251 (1940)). The movant must specify for the trial court exactly how the opponent failed to make a case: "[s]uch a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to judgment." Rule 50(a)(2). This is necessary so the losing party "will have had notice, before the close of evidence, of the alleged evidentiary deficiency." *Id.* at 454 (citing Rule 50(a)(2)). The Petitioners did not do this; they made no such argument as they make now. Instead, they argued only how their one-sided *inferences* from the disputed facts supported probable cause. With respect to qualified immunity, they stated only: "Now, my fallback position is qualified immunity, but that only goes to the federal cause of action. However, if you – well, that's my argument." [Respondents'] Further Excerpts of Record 3, lines 11-13. What is more, contrary to their assertion for the first time before this Court that qualified immunity is a matter of law for the court even in a Rule 50(a) motion where there are disputes of material fact, Docket Entry # 68 in the Central District of California demonstrates that Petitioners *filed* a "PROPOSED QUALIFIED IMMUNITY JURY INSTRUCTION." [Respondents'] Excerpts of Record ("ER") 294. The case law prohibits such an instruction. *See Rodriguez-Marin v. Rivera-Gonzalez,* 438 F.3d 72, 83 (1st Cir. 2006)(because qualified immunity is a legal question for the court to

decide, there is no jury instruction regarding it). Not only does this illustrate the way the Petitioners have changed horses in the middle of the stream in the course of this litigation, but it also demonstrates they do not have a firm grip on the law regarding qualified immunity.

The Petitioners do not contend at this late stage that there were no disputed issues of fact about probable cause to arrest. Rather, they contend that those disputed facts concerning probable cause *are not material* to qualified immunity, Pet. 14-15, and therefore, this Court should hold that qualified immunity should be decided solely by the district court as if Rule 50(a), with its mandate to examine the sufficiency of the evidence, does not exist and as if qualified immunity at this stage of trial were not a defense.

2. The Petitioners Waived Their Right to Assert Qualified Immunity As an Immunity from Suit.

Not only do Petitioners ignore Rule 50(a)'s clear mandate and this Court's explication of it, but they also ignore the very significant fact that they waived their right to qualified immunity as an immunity from suit, even as they as claim that same immunity now. "'No procedural principle is more familiar to this Court than that . . . a right may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having the jurisdiction to determine it.'" *Unitherm*, 546 U.S. at 404-05 (*quoting Yakus v. United States*, 321 U.S. 414, 444 (1944)). Qualified immunity, as a defense, does not have the same force as qualified immunity as an immunity from suit, because its

context is an ongoing trial by jury. That is why these Petitioners should not have their day in this Court, and especially not to directly challenge the purpose and application of Federal Rule of Civil Procedure 50(a) as if there were no jury.

This Court has admonished litigants yet again in its latest decision regarding qualified immunity: "'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson*, 129 S.Ct. at 815 (*quoting Hunter v. Bryant*, 502 U.S. 224, 227 (1991)(per curiam)(listing cases)). Despite this strong admonition, Petitioners did not raise qualified immunity at the "earliest possible stage in litigation," either in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) or in a motion for summary judgment under Federal Rule of Civil Procedure 56(b). Instead, in Petitioners' only motion for summary judgment – asserting that Respondents could not prove liability against the City of Los Angeles and the Los Angeles Police Department under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) – Petitioners acknowledged that "*[b]ecause triable issues of material fact exist regarding probable cause for [Respondent Torres's] arrest*, [Petitioners] move for partial summary judgment on *Monell* liability only." Pet. App. 10a (emphasis added). In short, Petitioners affirmatively waived their right to assert immunity from suit and qualified immunity became a defense. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is . . . permitted to go to trial."). In view of the clearly disputed facts, this was a wise decision on the part of Petitioners' trial counsel. It

was completely in accord with the law and the facts. Petitioners should not second-guess this decision before this Court.

Therefore, by Petitioners' own election, the issue of qualified immunity became "a mere defense." *Id.; accord, Sloman v. Tadlock,* 21 F.3d 1462, 1468 & n.6 (9th Cir. 1994)("The advantage of timing is already lost." "[S]ince the suit has already proceeded to its conclusion . . . it is now effectively a defense."). What is more, the Petitioners not only failed to raise qualified immunity early on in the pleading stage, but they also failed to seek an order narrowly tailoring discovery to the issue of qualified immunity, *see Anderson v. Creighton*, 483 U.S. 635, 646-647, n.6 (1987), and never moved for summary judgment on the issue. The Petitioners understood and freely admitted why there could be no immunity from suit: "[b]ecause triable issues of material fact exist[ed] regarding probable cause for [Respondent Torres's] arrest . . . ." Pet. App. 10a. Thus, Petitioners established the entire procedural context. It is too late to change that now, and it is too late to argue that the clearly disputed facts are somehow not material to whether there was probable cause. Pet. 14-15.

3. *Hunter v. Bryant*'s Undisputed Facts Establishing Probable Cause At Summary Judgment Cannot Trump the Reasonable Jury Standard in Rule 50(a), Because Disputes Involving the Historical Facts Leading Up to An Arrest Are for the Jury.

Petitioners claim this Court rejected any "reasonable jury" standard for qualified immunity in *Hunter v. Bryant*, 502 U.S. 224 (1991)(per curiam).

Pet. 12-16. They argue that even though they waited until a Rule 50(a) motion to bring up qualified immunity, "the court's task is *different* where qualified immunity is at stake" and "[r]eview is needed to clarify that even where qualified immunity is asserted in a Rule 50 motion for judgment as a matter of law, rather than a motion for summary judgment, *Hunter* controls and the reasonable jury standard [of Rule 50(a)] does not trump the straightforward "clearly established" inquiry. Pet. 16 (emphasis added).

Hunter is distinguishable. There, the facts were undisputed to establish probable cause and qualified immunity. *See* 502 U.S. at 228 (listing the undisputed facts). Here, by Petitioners' own admission, they were not. *Hunter* involved a summary judgment, precisely the vehicle prescribed by this Court to decide whether the officers were entitled to qualified immunity as an immunity from suit. In contrast, here the jury heard all the evidence, including the disputed facts material to whether there was probable cause to arrest Raymond Torres.

Disputed issues of fact surrounding probable cause are routinely decided by the jury when a case goes to trial. That is because "[a]rticulating precisely what . . . 'probable cause' mean[s] is not possible. [Probable cause is a] commonsense, nontechnical conception[] that deal[s] with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003)(quotations and citations omitted). Such considerations of everyday life upon which reasonably prudent people act certainly may be made by police in deciding whether there is probable cause, but when

the arrest's historical facts are disputed – such as whether a witness positively identified a suspect; whether a "gang sign" is being flashed when only one finger is visible; whether the photographic lineup was unduly suggestive; and whether standing in a school photo with gang members indicates guilt by association in a murder a year later – those disputed facts are uniquely for a jury, especially in a Rule 50(a) motion. *Cf. id.* at 371 (Court describes undisputed historical facts to hold there was probable cause). If the police may take into account considerations of everyday life to ensure their actions are reasonable and prudent in an arrest, so may a jury when the facts are disputed as to whether there was probable cause for that arrest.

This Court long ago recognized the critical difference between undisputed facts and a "belief of a fact"when determining whether there is probable cause. "[W]hen there is no dispute of fact, the question of probable cause is a question of law, for the determination of the court." *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co.*, 120 U.S. 141, 148 (1887). But "when the question of the defendants' belief of the facts relied upon to prove want of probable cause [is involved] . . . [w]hat their belief was is always a question for the jury." *Stewart v. Sonneborn*, 98 U.S. 187, 194 (1878). Even when the parties dispute the facts early on in litigation, discovery is necessary before a motion for summary judgment on qualified immunity grounds can be resolved. *See Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). And when, as here, the evidence clearly demonstrates a radical difference between how the police describe the historical facts and how witnesses

at trial describe those same facts, the issue is for the jury.

Unlike the reasons to change *Saucier's* judge-made protocol for qualified immunity this Court gave in *Pearson*, Petitioners do not suggest that the requirement that defendants bring qualified immunity to the table at the earliest possible stage of litigation is "unworkable or [is] badly reasoned." Likewise, there is no suggestion that this Court's pronouncements about how to apply Rule 50(a) are "unworkable or are badly reasoned." *Payne v. Tennessee,* 501 U.S. 808, 827 (1991)("when governing decisions are unworkable or are badly reasoned," the Court is not constrained to follow precedent). Even if there were a whiff of doubt about the efficacy or purpose of qualified immunity in a Rule 50(a) setting – which there is not – "[a]dhering to [such] precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Id.* at 827 (*quoting Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406 (1932)).

None of the reasons this Court provided for changing its mind in *Pearson* about qualified immunity protocol is present in this case. There is no reason whatsoever that this Court should grant certiorari under these circumstances, where Petitioners wisely forfeited a potential immunity from suit in the face of disputed facts; failed to pursue narrowly tailored discovery; the parties had settled expectations under the Seventh Amendment about the role of the jury should the evidence be sufficient and conflicting; where reliance on the proper application of Rule 50(a) is paramount given the words of that statute and Congressional intent; and finally, where

nothing suggests that the judge-made rule that qualified immunity be brought at the earliest possible stages of litigation is unworkable or badly reasoned such that the "clearly established" inquiry should trump it to make an immunity from jury review out of what became a defense.

4. There Is No Conflict Among the Circuits.

Petitioners claim that the circuits are deciding these cases differently and that this Court should resolve the conflict. This Court need not do so, because all of the cases Petitioners cite are either not in conflict with the Ninth Circuit or are not on point.

For example, Petitioners cite *Rodriguez-Marin v. Rivera-Gonzales*, 438 F.3d 72 (1st Cir. 2006), for the proposition that qualified immunity is never a question for the jury. This statement does not accurately reflect what the First Circuit says, which is:

> [Whether a reasonable officer would understand that the challenged conduct violated an established right] is also a question of law, *but factual questions, to the extent they are antecedent to this determination, must be determined by a jury.* While preliminary factual questions regarding qualified immunity are sent to the jury, the legal question of the availability of qualified immunity is ultimately committed to the court's judgment.
>
> . . . Defendants . . . are not entitled to a jury instruction regarding qualified immunity, since it is a legal question for the court to decide. *Defendants are entitled to have a jury determine any preliminary factual questions*[.]

438 F.3d at 83 (emphasis added). Thus the First Circuit agrees with the Ninth Circuit, that where preliminary factual disputes exist, "[Petitioners] Roberts and Park were not entitled to qualified immunity as a matter of law." Pet. App. 25a.

Petitioners say the Fourth Circuit holds that the legal question of qualified immunity is for the court "under a particular set of facts." *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005). This level of generality is not helpful when the facts in *Willingham*, like *Torres*, were highly disputed as to whether there was probable cause. In *Willingham*, the Fourth Circuit agrees with this Court, the Ninth Circuit, and the First Circuit:

> There is no question that when the historical facts are undisputed, whether a reasonable officer should have known of the illegality of his conduct is a question of law for the court. The existence of *disputed* material facts – *which must be submitted to a jury* – does not alter the essentially legal nature of the question of whether the right at issue was clearly established.

Id. at 559 (internal citations and quotations omitted)(emphasis added). The First Circuit continues:

> [J]uries are ill-suited to make the determinations of law required by the qualified immunity analysis. Therefore, to the extent that a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court

> should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury.

Id. at 560. Again, Petitioners freely admitted here that there were disputes of material fact precluding a conclusive ruling on qualified immunity at the summary judgment stage. These disputed facts were in evidence and should have been submitted to the jury.

Petitioners' third case, *Riccardo v. Rausch*, 375 F.3d 521 (7th Cir. 2004), has no application here. A jury awarded Riccardo damages of $1.5 million because Rausch, a prison guard, had placed Riccardo in the same jail cell as Juan Garcia, who sexually assaulted Riccardo. Petitioners quote the Seventh Circuit out of context. At the end of the same paragraph from which Petitioner's quote is excerpted, *see* Pet. 20, the court states:

> *We need not pursue the immunity defense*, however, because *Saucier* calls on appellate courts to address the merits first, and Rausch is entitled to prevail outright: no reasonable jury could have concluded, on this record, that Rausch actually recognized that placing Garcia and Riccardo together exposed Riccardo to substantial risk.

375 F.3d at 526 (citations omitted). Because the Seventh Circuit did not place its holding on an analysis of qualified immunity at all, the case is entirely inapposite.

Finally, in *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002), Petitioners quote the Eleventh Circuit for a statement that is not in conflict with the Ninth Circuit, other circuits, or this Court. Pet. 20. This is clear from what the Eleventh Circuit actually says:

> But if the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial.
>
> Defendants who are not successful with their qualified immunity defense before trial can re-assert it at the end of the plaintiff's case in a Rule 50(a) motion. That type of motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion usually will be included in the evidence presented during the plaintiff's case, although sometimes evidence that is considered at the summary judgment stage may turn out not to be admissible at trial. *Where there is no change in the evidence, the same evidentiary dispute that got the plaintiff past a summary judgment motion asserting the qualified immunity defense will usually get that plaintiff past a Rule 50(a) motion asserting the defense*, although the district court is free to change its mind.
>
> It is important to recognize, however, that a *defendant* is entitled to have any evidentiary disputes upon which the qualified immunity defense turns decided by the jury so that the court can apply the jury's factual

> determinations to the law and enter a post-trial decision on the defense. *When the case goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.*

280 F.3d at 1317-18 (citations omitted)(emphasis added). The Ninth Circuit agrees that the disputed issues of historical fact were for the jury when it said: "in this case historical facts material to the qualified immunity determination are in dispute." Pet. App. 23a. Once more, the Petitioners admitted as much in their motion for summary judgment on the *Monell* claim.

Thus, the purported conflict among the circuits does not exist. The point that Petitioners side-step is that if the Rule 50(a) motion is denied, the case goes to the jury. Or, as in this case, if the district court errs in its Rule 50(a) determination, and is reversed by a court of appeals, then the case goes to the jury. It is simply not the case, as Petitioners would have it, that the qualified immunity defense is *never* for a jury. That is only so if the facts supporting probable cause are undisputed. If Petitioners now believe that the historical disputed facts are not material, Pet. 14-15, it is only because they are weighing those facts in their own favor. That is not their role; it is the jury's.

5. Petitioners Have Distorted the Facts.

In an effort to persuade this Court, Petitioners have transmogrified the facts as follows:

• Petitioners assert that "Torres *matched the description* Diana provided." Pet. 22 (emphasis added). Not so. The record shows that Torres only partially matched the very *general* description Diana had provided, and that "Detective Roberts acknowledged at trial that *Diana's description was too generic to go anywhere with it.*" Pet. App. 5a (emphasis added).

Also, Diana's description "did not match Torres insofar as Diana described the third male passenger as having some hair," Pet. App. 17a, because Torres had shaved his head. Pet. App. 6a. And her description did not match what the school officials told Petitioners; namely, that Torres "always wears [a] grey metal cross on a chain around his neck," Pet. App. 7a, while Diana did not mention a chain or cross around the passenger's neck. Pet. App. 7a, 17a.

• Petitioners assert that "[they] knew prior to the commission of the crime, Torres spent several hours with the driver *and the shooter*, who were both known gang members." Pet. 23 (emphasis added).

The facts are otherwise. Petitioners did know that Torres and the driver, Santillan, went to the same high school and "hung out" at lunchtime (and not at any other time or place). Pet. App. 6a-7a. But there is no evidence that Castaneda, the shooter, attended that same school or that Torres had ever met or spoken with him. And there is no evidence that Torres had spent several hours with Castaneda prior to the commission of the crime. The only evidence that Torres and Santillan were together was the group photo, taken by a teacher at a school event called "Melody of Words" that a high school official had given

to the LAPD "*a year earlier* when it was investigating Santillan in connection with another shooting . . . ." Pet. App. 6a (emphasis added).

• Petitioners claim that "while Diana may not have positively identified him, she picked Torres' photograph from the six-pack photographic array as the person who looked '*most like*' the third suspect." Pet. 23. This is a disingenuous "spin" of what the record reflects Diana actually said. Diana never said "*most* like;" she said Torres looked "*more likely* [sic] *to* the other guy in the car." Pet. App. 9a (emphasis added). And the Petition masks the mendacity with which the officers acted just after arresting Torres. Those officers wrote a flat, unequivocal statement: "[She] identified Torres as the fourth person in the car with them [when] the incident occurred." ER 238 (Arrest Report).

Moreover, Petitioners have failed to describe the other facts accompanying the manner in which they presented the six-pack to Diana. The Ninth Circuit recounts the evidence at trial:

> Detectives Roberts and Park went inside to show Diana the six-pack; Detective Roberts waited outside in his car. Detective Roberts told Diana that he 'had possibly identified the 15- to 16-year old chubby boy' and then read her a standard 'photographic show-up admonition.'
>
> After Detective Roberts handed Diana the six-pack, Diana stared at it – according to Diana for between *five and ten minutes* – whereupon Detective Roberts [changed the question and] asked her *at whom she was staring*. Diana then

> indicated that she was staring at photo #6, the photo of Torres. However, there was conflicting testimony as to whether Diana also stated that the person in photo #6 was the third male passenger in the car, or, on the contrary, whether she stated that she did not know whether it was him or not. It is undisputed, however, that the detectives then asked Diana to write down what she thought, whereupon Diana wrote on the six-pack, 'I circle the person in #6 because he looks *more likely* [sic] *to* the other guy in the car.' Detective Roberts acknowledged at trial that, based solely on what Diana wrote on the six-pack, he did *not* have probable cause to arrest Torres.

Pet. App. 8a-9a (emphasis added).

• Petitioners assert that "[they] knew that Torres had gone into rival gang territory with known gang members and challenged rival gang members by flashing gang hand signs and shouting challenges." Pet. 23.

However, Petitioners provide no citation to the record for this statement because there is none. The only record evidence is that Torres was copying the gangster "look;" was "hanging out" at lunch with Santillan at his high school; and appeared in a group photo taken by a teacher at a school event called "Melody of Words" [a book fair] a year earlier that included Santillan and two otherwise uninvolved individuals who were CPA gang members. Pet. App. 6a. More importantly, "Detectives Roberts and Park both testified that, at the time of Torres' arrest, *they were unaware one way or the other whether Torres was*

a member of the CPA gang." Pet. App. 7a (emphasis added).

Furthermore, because of conflicting testimony, the Ninth Circuit noted that Defendants had conceded that the court must "assume the following: that school police officer Steinberg did *not* tell Officer Lamar or Detective Hickman that Torres had 'recently been jumped into the CPA gang'. . . ." Pet. App. 16a (emphasis added).

• Petitioners have failed to mention two significant facts that the court of appeals took into account: First, "Detective Hickman searched Torres' name in *six different databases*: an adult criminal records database, a juvenile records database, a Department of Motor Vehicles records database, the California Criminal History Record System, *the Cal-Gangs database*, and the *gang card file at the West Valley police station*. Detective Hickman *found no matches for Torres*." Pet. App. 7a (emphasis added). And second: "Detective Park acknowledged at trial that at the time of Torres' arrest there was *no physical evidence* linking Torres to the shooting." Pet. App. 9a (emphasis added).

• Petitioners claim that "[t]hey knew that Torres was in the back seat with the shooter just before the murder, at the time of the murder, and after the murder." Pet. 23. Petitioners cannot point to any place in the record for these assertions. The detectives were not present to witness the car chase and murder. For Petitioners to know that Torres was in the back seat with the shooter *at any time*, Diana would have had to positively identify Torres as being in the car that day. She did not. In fact, she testified that she had been

saying the same thing since she was first interviewed on August 25, 2004: "Which was that I didn't know who . . . was the guy. I don't remember the face of the guy because that was the first time I seen him in my whole entire life. It was just for a couple hours I seen the guy." ER: 181:10-18. She elaborated: "I don't remember him that good because it was the first time, and I didn't tell them it's probably him or not." ER 182:10-12.

Furthermore, Diana testified that she was not changing her story with respect to the "other guy," just as she was not backing off from her positive identifications of her boyfriend (the driver) and the shooter:

> I told everybody the same thing. I haven't changed my story, it's him or it's not him.
>
> . . . . If I was trying to accuse him and then try to back up, I would have done it with the shooter too and the driver too, because the shooter is from Canoga and the driver talks to Canogas. So I would have done the same thing because, I mean, with the shooter I said it's him, and it's him. I wrote it down, it's him, and I didn't back off. If it would have been him, I would have told you it's him. If it wasn't him, I would have told you, I'm not sure, I don't remember if it's him or not.

ER 185:3-14.

Yet Rains wrote unequivocally in the Arrest Report that, "[Diana] identified Torres as the fourth person in the car with them [when] the incident occurred." ER

238. When Diana was shown *that* statement in the Arrest Report, Diana testified that this statement was *false*. ER 186:20-23 ("So, is the statement [Diana] identified Torres as the fourth person in the car with them, I'm inserting a word, when the incident occurred, is that statement false? A. Yes."). She testified that she did *not* "positively identify No. 6 as being the person in the back seat of the car." ER 218:20 to 219:2 (Q: "That statement says you positively identified No. 6 as being the person in the back seat of the car. Did you do that? " A: "No.").

Even if the dispute over whether the six-pack was suggestive and whether Detective Roberts had infected the identification process by telling Diana that the detectives had "possibly identified the 15 to 16 year-old chubby boy," Pet. App. 18a, are *ignored*, Diana made no positive identification. There is no positive identification because after "[Diana] stared at [the six-pack] in silence for between *five and ten minutes* and then, upon being asked *at whom she was staring* [which is not the same as being asked who was in the car "before the murder, at the time of the murder, and after the murder"], she made only a *comparative* identification. She stated that Torres looked *more like* the third male passenger than the other persons depicted in the six-pack (only one of whom was visibly overweight), "but that she was not sure whether or not it actually was him." Pet. App. 19a.

Moreover, there is indicia only of a *lack* of reliability: "While Diana [only] spent *several hours* in the car with the third male passenger, *she had never seen him before and did not pay attention to him*. In addition, . . . Diana gave only a general description of the third male passenger, which did not match Torres

in two important respects (head of hair and no mention of prominent cross). Further, Diana was not shown the six-pack until *six weeks after the shooting*." Pet. App. 19a (emphasis added).

On the facts the Petitioners claim to have known, *see* Pet. 23, Petitioners offer their conclusion that there existed "*more* than a 'fair probability' for [them] to conclude that Torres was the third suspect in the vehicle and that he aided and abetted in the murder and attempted murder." Pet. 22 (emphasis added). But the claimed facts are *not* borne out by the record. On the record facts or inferences to which Torres was entitled, Petitioners are *not* entitled to qualified immunity as a matter of law. A jury is needed to resolve the factual disputes to assist the district court, and to serve one of the two interests that this Court has recognized: "the need to hold public officials accountable when they exercise power irresponsibly." *Pearson*, 129 S.Ct. at 815.

Did Petitioners have a reasonable alternative? Yes. The skimpy facts known to Petitioners cried out for more investigation, or at least a conversation with Torres before he was arrested, which did not occur. *See* Pet. App. 9a. The issue is whether Petitioners acted reasonably and with prudence here when they concluded they had probable cause. If they must apply the "factual and practical considerations of everyday life," *Maryland v. Pringle,* 540 U.S. at 370, they must for starters tell the truth and not jump to unwarranted conclusions.

Wanting to avoid a jury verdict altogether, Petitioners not only distort the facts (as above), they assert that the issue of qualified immunity is "never a

jury question." Pet. 19. They claim that in this case, the Ninth Circuit confused "*undisputed* historical facts" with "the inferences properly drawn from [those facts]." Pet. 19 n.4 (emphasis added). Oddly, Petitioners also assert that in *Torres,* the Ninth Circuit "confused *disputed* facts with the disputed inferences that could be drawn from those facts." Pet. 20 (emphasis added). Whatever Petitioners may mean, they are the ones who are confused. One example suffices: in the photograph of Raymond Torres at the school book fair, taken from some distance, only one of his fingers is visible. That is a fact. The inference drawn, or the *belief* the officers had about this fact, was that this one finger was flashing a gang sign. The inference drawn, or the *belief* the Respondents had, was that no one looking at this photograph could seriously believe that a gang sign was being flashed from just this one visible finger. Long ago – 131 years ago to be precise – this Court decided this particular problem elegantly: "when the question of the defendants' belief of the facts relied upon to prove want of probable cause [is involved] . . . [w]hat their belief was is always a question for the jury." *Stewart v. Sonneborn,* 98 U.S. 187, 194 (1878). No amount of epistemological posturing that a "belief" is some sort of proper "inference" can change this law. Beliefs about facts are the same as inferences from facts, and they can differ from person to person. In any event, "the drawing of legitimate *inferences* from the facts are *jury* functions, not those of a judge, whether he is ruling on a motion for summary judgment *or for a directed verdict.*" *Anderson v. Liberty Lobby,* 477 U.S. at 255 (emphasis added). "The evidence of the non-movant is to be believed by the judge in deciding a Rule 50(a) motion, and all

justifiable inferences are to be drawn in his favor." *Id.* (emphasis added).

6. There Is No Reason Why this Case Should Not Be Remanded for Trial.

On remand, were a jury to decide that Petitioners had violated Torres's clearly established right not to be arrested without a warrant and in the absence of probable cause, and that no reasonable police officer would have arrested him under the circumstances the jury finds were known to the Petitioners at the time, those decisions would be justified: "[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law, . . . and insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz v. Economou*, 438 U.S. 478, 506-507 (1978).

On remand, Petitioners must make their Rule 50(a) motion before the jury reaches a verdict, and can renew their motion for judgment as a matter of law after the verdict by invoking Rule 50(b). Once the jury resolves the disputed factual issues, it will establish "a particular set of facts." *Willingham*, 412 F.3d at 560. The district court can then decide the issue of qualified immunity as a matter of law under Rule 50(b), and that decision will be reviewable.

For these reasons, there is no occasion for this Court to decide that the doctrine of qualified immunity is a *sub silentio* amendment to Rule 50.

CONCLUSION

This case presents no occasion for this Court to further sculpt the doctrine of qualified immunity or to hold that the doctrine is an exception to or somehow modifies Rule 50(a) of the Federal Rules of Civil Procedure.

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

Julia A. Follansbee
Follansbee & Associates
Counsel of Record
61510 Cougar Trail
Bend, Oregon 97701
(541) 318-5991

Nelson E. Brestoff
Nelson E. Brestoff,
A Professional Law Corporation
7701 Woodley Avenue, Suite 120
Van Nuys, California 91406

Counsel for Respondents